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IN THE

Supreme Court of the United States

October Term, 1983

NUNZIATO FUSARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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July, 1983

QUESTIONS PRESENTED

1. Whether criminal intent is an essential element of the crime of issuing a bank draft without proper authority, as defined in 18 U.S.C. § 1005, where the 1948 Revisers inadvertently omitted the "intent to injure or defraud" requirement originally established by Congress?*

2. Can an indictment, which tracks the language omitting from § 1005 the criminal intent requirement, be cured by a jury instruction that "intent to injure or defraud" is a necessary element of a § 1005 offense?

3. Whether a federal trial court, in holding a hearing mandated by *Remmer* v. *United States*, 347 U.S. 227 (1954), to assess the prejudicial impact of extrajudicial contact between a jury foreman and an FBI agent working in the prosecutor's office, is required to examine the juror himself?

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* The First Circuit Court of Appeals acknowledged that "the circuits are split on this issue." (App. A, p. 3.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NUNZIATO FUSARO, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Nunziato Fusaro respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on May 26, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, entered on May 26, 1983, which is presently unreported, is reprinted in Appendix A.

No opinion was rendered by the United States District Court for the District of Massachusetts.

JURISDICTION

The judgment of the First Circuit, affirming the District Court's judgment of conviction was entered on May 26, 1983. It is reprinted in Appendix B. This petition is filed within 60 days

of the date of judgment in compliance with Rule 20.1. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury....

Section 1005, Title 18, United States Code: Bank entries, reports and transactions:

> Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or
>
> Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or
>
> Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to ex-

amine the affairs of such bank, or the Board of Governors of the Federal Reserve System

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner is 88 years old and has practiced law for over 65 years in Worcester, Massachusetts. His law practice centered on the trial of personal injury actions. He is a former president of the Worcester Bar Association, the Massachusetts Trial Lawyers Association and the Boston University Law School Alumni Association. He has been honored for meritorious service to the above law school and to other educational institutions. (Tr. Nov. 18, a.m., pp. 15-16.)[1]

Petitioner practiced law with his brother, who was experienced in commercial and banking matters. Following the illness of his brother, who died in 1975, he was forced to assume the overall management of the firm. However, he refrained from becoming personally involved in his brother's specialty. (Tr. Nov. 18, a.m., pp. 7, 4.) Among the commercial clients for whom the Petitioner assumed responsibility was Richard Robidoux, who owned a Chevrolet new car dealership. A few years later, Mr. Fusaro's firm was named counsel to Mohawk Bank and Trust Co., whose president and director was Richard Saccone. (Tr. Nov. 18, a.m., pp. 18-19.)

For the purpose of this petition, it is not necessary to review the many complex and cumbersome banking transactions that allegedly implicated Robidoux, Saccone and the Petitioner. In April of 1981, in the District of Massachusetts, Petitioner, Robidoux and Saccone were charged in a 38-count indictment with conspiracy and substantive violations of federal banking laws: 18 U.S.C. §§ 2 (aiding and abetting); 371 (conspiracy); 215 (agreeing to receive a fee for procuring a bank loan); 656 (misapplica-

[1] Tr. refers to pages of the record filed in the Court of Appeals.

tion of bank funds); 1005 (making false entries in a bank statement and issuing bank drafts without authority); and 1014 (making false statements for the purpose of influencing action on bank loans).

In essence, the indictment alleged the three defendants—the owner of a Chevrolet new car dealership, the president of a bank and trust company, and the Petitioner—violated certain federal banking laws by arranging approximately $720,000 in loans to the car dealership without the approval of the bank's Executive Committee and based on false financial information.

The prosecution against the Petitioner proceeded essentially on an aiding and abetting theory. Mr. Fusaro was found not guilty on three counts, but was convicted of the remaining 35 counts. He was sentenced under the conspiracy count to a three-year term of imprisonment, 30 days to be served. The entire prison sentence was ultimately suspended and Petitioner was placed on probation for a period of two years. He was fined a total of $40,000 and ordered to engage in public service eight hours a week for the first six months of the probation period.

The Problem Involving Construction of 18 U.S.C. § 1005

The second paragraph of 18 U.S.C. § 1005 makes it illegal for anyone to issue bank drafts without proper authority. Nothing is said in this paragraph about the prohibited action being "with intent to injure or defraud" the bank.[2] In striking contrast, the third paragraph of § 1005 makes it a crime to falsify a bank report or statement "with intent to injure or defraud" the bank.

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[2] The second paragraph reads: "Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond or other obligation, or mortgage, or judgment or decree; or. . . ."

The first paragraph of § 1005 penalizes any bank officer who, without authority, issues or puts in circulation any bank notes. As in the second paragraph, the statutory description of this offense fails to mention "intent to injure or defraud" the bank.

The problem presented by this case is whether Congress, in the second paragraph of § 1005, meant to require a specific intent to injure or defraud the bank. The Second and Ninth Circuits have investigated the history of § 1005 and concluded that the language "intent to injure or defraud" was inadvertently omitted from this provision when it was revised in 1948.[3] However, the Fifth Circuit has decided that the absence of an intent requirement was too plain on the statute's face to require further judicial inquiry into its history.[4]

Counts 19 through 24 of the indictment in this case, charging a violation of the second paragraph of § 1005, literally tracked the language of that section and, consequently, failed to allege any "intent to defraud" the bank. Petitioner challenged this pleading defect in his motion for judgment of acquittal. (Tr. Nov. 24, a.m., p. 160.)[5] The motion was denied.

The trial judge instructed the jury that an "intent to injure or defraud" the bank is a necessary element of the § 1005 offense.[6]

The First Circuit's Decision

The Petitioner renewed his claim in the First Circuit that the § 1005 counts failed to state a federal offense because: (1) "intent to injure or defraud" is an implied and necessary element of the

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[3] *United States* v. *Docherty*, 468 F.2d 989, 994-995 (2d Circ. 1972); *United States* v. *Pollack*, 503 F.2d 87, 90-91 (9th Cir. 1974); *Ramirez* v. *United States*, 318 F.2d 155, 158 (9th Cir. 1963). In 1948 when Congress modernized the Banking Law and created § 1005, it did so "without changing in any way the meaning or the substance of existing law." Reviser's Notes to 18 U.S.C. § 656 and 1005. Apparently the significant language "intent to injure or defraud" was accidentally omitted from the first two paragraphs of § 1005, but was included in the third paragraph.

[4] *Harrison* v. *United States*, 279 F.2d 19, 23 (5th Cir. 1960).

[5] Since the first question presented in this petition concerns the indictment and conviction for violations of § 1005 (Counts 19 through 24), it bears emphasis that petitioner was fined a total of $6,000—$1,000 on each of the six counts.

[6] The four elements of the offense were said to be: (1) that the defendant Saccone was an officer or director of a bank; (2) that Saccone issued the notes of such bank; (3) that he did so without authority from the directors of such; and (4) that he acted with the intent to injure or defraud such bank (A 63). The Petitioner Fusaro, as well as Robidoux, was charged with aiding and abetting Saccone in the violation of § 1005.

second paragraph of § 1005, and (2) Counts 19 through 24 did not include this essential element of intent. The First Circuit declined to decide whether intent is an implied and necessary element of this offense, but expressly acknowledged that "the circuits are split on this issue." (App. A, p. 9.)

Instead, the First Circuit relied on the doctrine that "when the crime is defined by statute without reference to intent, the indictment need not allege it." (App. A, p. 9.) Thus the First Circuit held the indictment is sufficient if the offense is described with enough clarity to enable the accused to understand the nature of the charge. Consequently, the court concluded the indictment was adequate.

Finally, the First Circuit held the Petitioner was not prejudiced by the indictment's failure to assert "intent to defraud," since the jury was instructed on this crucial element. The error, if any, was considered by the First Circuit to be harmless under Rule 52(a) of the Federal Rules of Criminal Procedure. (App. A, p. 9.)

Reasons For Granting The Writ

The decision below raises two narrow but uniquely important questions in the fair administration of federal criminal justice. Certiorari should be granted as to both.

I

A critical and unresolved problem of statutory interpretation is raised, stemming from a reviser's omission of the original "intent to defraud" ingredient from the second paragraph of 18 U.S.C. § 1005.

As the law now stands in this country, persons charged with a violation of § 1005, a formidable statute frequently used to prosecute various forms of bank fraud, are tried under two entirely distinct standards. In the Fifth Circuit a defendant can

be convicted under § 1005 without any proof of "intent to defraud" a bank. The court in *Harrison* v. *United States*, 279 F.2d 19, 23 (5th Cir. 1960), took the flat position that the first two paragraphs of § 1005 are too obvious in their omission of a specific intent to warrant judicial inquiry concerning the original intent of Congress. The basic intuition underlying the Fifth Circuit's ruling is that "[t]he acts described in those two paragraphs are made criminal per se," without any need to prove intent to injure or defraud the bank. *Id.*

However, in the Second and Ninth Circuits no person can be successfully prosecuted without the Government's proving beyond a reasonable doubt a specific intent to "injure or defraud" the bank. These two prominent circuit courts have looked behind this conspicous omission and have concluded that it was an "ill-conceived work of the 1948 Reviser." They have, therefore, construed § 1005 to require an "intent to injure or defraud" the bank. *United States* v. *Pollack*, 503 F.2d 87, 90-91 (9th Cir. 1974); *Ramirez* v. *United States*, 318 F.2d 155, 158 (9th Cir. 1963); *United States* v. *Docherty*, 468 F.2d 989, 994-995 (2d. Cir. 1972). The Second Circuit in the *Docherty* case said:

> "[C]ourts must be mindful of its history and avoid undue extension as a result of the ill-conceived work of the 1948 reviser. Until that time the statute, as previously noted, had included the element of intent 'to injure or defraud' the bank or 'to deceive' a bank officer or agent appointed to examine the affairs of the bank." 468 F.2d at 994-995.

While acknowledging that these other circuits are in conflict over this problem of statutory construction, the First Circuit sought to avoid committing itself on this issue by holding that the indictment sufficiently reflected the language of the statute. But in so doing, the court proceeded to resolve the case on the unarticulated assumption that § 1005 does indeed exclude specific intent as an essential ingredient. Thus, it sought to validate the indictment for reasons that are viable only if § 1005 does not require specific intent; and rather inconsistently held the jury instruction on intent cured whatever defect existed in the in-

dictment with respect to the intent requirement. In effect, the First Circuit's opinion implicitly aligns itself with the Fifth Circuit's analysis in *Harrison*, *supra*, thus bringing it into direct conflict with the interpretation employed by the Second and Ninth Circuits.

The consequences of this dramatic conflict among the circuit courts are broad and profound. Today bank fraud violations, not including bank robbery, form one of the largest categories of criminal prosecutions conducted throughout the United States. During 1981, for instance, there were 1,447 criminal prosecutions for violations of federal banking laws, exceeding the number for mail and wire fraud, as well as income tax violations. Bank fraud violations form the sixth largest category of federal prosecutions in the country, and have risen significantly over the past three fiscal years.[7] This trend can be expected to continue due to the difficulties that banks have experienced during these times of economic distress.[8] Thus this problem is a recurring one and obviously needs to be resolved.

While it is true that certain criminal statutes do not require intent, thus making it unnecessary for the indictment to allege intent, *United States* v. *Behrman*, 258 U.S. 280, 288 (1922), this is not a universal principle for testing the sufficiency of an indictment. As this Court observed in *Hamling* v. *United States*, 418 U.S. 87, 117 (1974), it may be "generally sufficient that an indictment set forth the offense in the words of the statute itself," but only if the words of the statute "fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."[9]

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[7] In 1979 there were 1,132 banking law violations prosecuted; in 1980, 1,325; and in 1981, 1,447. The figures for 1982 are not yet available. Source of statistics: U.S. Department of Justice, Executive Office for United States Attorneys, Statistical Report 1-21, Fiscal Year 1981, Table 3-A.

[8] *See, e.g.*, The New York Times, July 25, 1982, § III, at 1, col. 2 (Staggering Losses at Chase Manhattan Bank and Continental Bank of Illinois Shake Banking Industry).

[9] *See also United States* v. *Carll*, 105 U.S. 611, 612 (1882). ("Where as here the statute alone does not set forth all the essential elements of the offense,

In this case there is a serious question whether the statute, as revised, does "set forth all the elements necessary to constitute the offense intended to be punished." If the Second and Ninth Circuits are right that Congress intended "intent to injure or defraud" to be an indispensable element of § 1005, and that the omission of this element in the revised law is simply the "result of the ill-conceived work of the 1948 reviser," then Petitioner's indictment was fatally deficient because it failed to allege that requisite element.[10]

There can be no question that specific intent was an essential element of § 1005's predecessor statute, § 5209. In *United States* v. *Britton*, 107 U.S. 655 (1883), this Court held that where an indictment, charging violations of § 5209, failed to allege "intent to defraud," it was jurisdictionally defective. This Court declared:

> "The intent to injure and defraud is an essential element to every offense specified in the section, and the failure to allege intent is a *fatal defect* in the counts in which it occurred." *Id.* at 669 (emphasis added).

Consequently, if the indictment in this case is flawed for failure to allege a special brand of intent, this jurisdictional deficiency cannot be overcome by the indictment's giving fair notice to the accused of the nature of the ascribed crime. In this event, the Fifth Amendment would require the indictment's invalidation, absent a "resubmission to the grand jury." This rule is strongly rooted in constitutional tradition. *Russell* v. *United States*, 369 U.S. 749, 770 (1962); *Stirone* v. *United States*, 361 U.S. 212, 218 (1960); *Ex parte Bain*, 121 U.S. 1, 13 (1887).[11]

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the indictment is insufficient which simply tracks the language of the statute"); *United States* v. *Opstra*, 659 F.2d 848, 850 (8th Cir. 1981).

[10] *See United States* v. *Debrow*, 346 U.S. 374, 376 (1953); *Morrissette* v. *United States*, 342 U.S. 246, 270 n. 30 (1952); *Hagner* v. *United States*, 285 U.S. 427, 431 (1932).

[11] In *United States* v. *Denmon*, 483 F.2d 1093, 1097 (8th Cir. 1973), the Eighth Circuit held that where criminal intent is an essential element of an offense, and the indictment did not so charge, "we cannot say that the grand jury would have returned a true bill against the defendant if the essential element of a criminal intent would have been included in the indictment."

And if the indictment should have alleged an intent to defraud, no amount of instruction to the jury (*United States* v. *Denmon*, 483 F.2d 1093, 1097 (8th Cir. 1973)), or lack of prejudice to the defendant (*United States* v. *Smith*, 553 F.2d 1239, 1242 (10th Cir. 1977)), or finding of harmless error (*United States* v. *Carroll*, 582 F.2d 942, 944 (5th Cir. 1978)), can rescue it.

Specifically, the First Circuit's holding that the jury instruction on intent to defraud rendered the omission of that language in the indictment "harmless error"[12] conflicts with the rulings of other circuits that such a curative instruction constitutes a constructive amendment and "violates the defendant's right to be tried only on charges presented in the indictment."[13]

All of which brings us back to the central issue deserving certiorari review, i.e., the problem whether an "intent to injure or defraud" a bank is an essential element of the crime described in second paragraph of § 1005. If it is not such an ingredient, then the decision below is correct concerning the indictment's propriety and the error was harmless. On the other hand, if the statute does contemplate such intent as a requisite element, and the reviser's omission is inadvertent, then the First Circuit's ruling is clearly wrong. But this crucial problem of statutory construction cannot be avoided, as the First Circuit sought to do. Until the issue is resolved, the propriety of the indictment and the curative value of the instructions as to intent cannot be assessed.

This critical question of statutory construction has inspired the conflict among the circuit courts. On this issue, Petitioner relies on Justice Holmes remark: "[w]e agree to all the generalities about not supplying criminal laws with what they omit, but

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[12] The First Circuit cites two of its own precedents to support the proposition that the jury instructions as to intent bring the harmless error doctrine into play. App. A, p. 9. But those two cases involved Fed.R.Crim.P. 7(a), dealing with the harmless error of misciting statutes.

[13] *United States* v. *Gonzalez*, 661 F.2d 488, 492 (5th Cir. 1981). To the same effect are *United States* v. *Ylda*, 653 F.2d 912, 914 (5th Cir. 1981); *United States* v. *Carlson*, 616 F.2d 446 (9th Cir. 1980); *United States* v. *Salinas*, 601 F.2d 1279, 1290 (5th Cir. 1979).

there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929). And what laws can sometimes mean is what code revisers may have inadvertently omitted. Because of the crucial conflict in the circuits and because bank fraud prosecutions are on the rise, we can expect that this troublesome problem of statutory construction will continue to fester. The thousands of persons who are charged each year with violations of § 1005 are entitled to know the essential ingredients of that crime, so that they may properly prepare their defense. This Court's resolution of this statutory problem is necessary in order to avoid future confusion in his important area of the law.

II

A federal trial court, in holding a hearing mandated by *Remmer* v. *United States*, 347 U.S. 227 (1954), to assess the prejudicial impact of extrajudicial contact between a jury foreman and an FBI agent, should examine the juror himself.

A novel question is raised in this case by the trial judge's concluding there was no prejudicial conduct in an FBI agent's talking with the foreman of Petitioner's jury. The court's failure to examine the jury foreman while investigating this incident deprived Petitioner of the fair administration of justice, as well as his rights under the Fifth and Sixth Amendments.[14] Thus, the question left unresolved by both *Smith* v. *Phillips*, 455 U.S. 209 (1982), and *Remmer* v. *United States*, 347 U.S. 227 (1954), is the minimal procedures required for a hearing on juror prejudice. The "risk of erroneous deprivation" of a defendant's right to an impartial jury requires, at minimum, the juror be examined at the hearing. *See Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). In *Smith* this Court noted that "determinations made

[14] The judge's findings in this case are entitled to less weight than in *Smith* v. *Phillips*, 455 U.S. 209 (1982), because the latter was a federal habeas corpus action in which the trial judge's findings are "presumptively correct under 28 U.S.C. § 2254(d)." 455 U.S. at 218.

in *Remmer* type hearings will frequently turn upon the testimony of the juror in question. . . ." 455 U.S. 209, 217 n. 7.

On the second day of trial, Brian McLaughlin, an FBI agent attached to the prosecutor's office in this case, was seen engaged in an animated five-minute conversation with the foreman of Mr. Fusaro's jury. (App. A, p. 10.) Petitioner's counsel called this unusual occurrence to the court's attention. The judge questioned both the prosecutor and the FBI agent (who was not under oath) about the nature of the conversation, but the jury foreman was never questioned. In the words of the First Circuit, "[t]he FBI agent testified that he had met the foreman at a local wood-working class, that at the time of the conversation the agent did not know the foreman was a juror, that the conversation in no way included any aspect of the trial, that the FBI agent had nothing to do with the case, and that, having learned the juror's status, the FBI agent had avoided any further contact with him." (App. A, p. 11.)

Although defense counsel initially was satisfied that there was no prejudice, after consulting with the Petitioner he moved to have the foreman replaced by one of the four available alternate jurors. The trial court denied Petitioner's motion, finding "[n]o possible prejudice to any of the defendants" (Tr. Oct. 20, p.m., p. 9). It bears repeating that at no time did the judge question the juror to determine the possible existence of prejudice or to corroborate the FBI agent's unsworn statements.

The First Circuit disposed of the matter by stating, "[t]he foreman had a seemingly harmless encounter with someone completely uninvolved in the case," and that until Petitioner "chose belatedly to object, everyone agreed that this minor incident did not require dismissal of the foreman." Thus the court concluded that "the trial court did not abuse its discretion" in handling the matter. (App. A, p. 11.)

The First Circuit's approval of the trial judge's one-sided investigation of the jury foreman's disturbing contact with an FBI agent raises the gravest constitutional doubts. The failure to interrogate the jury foreman about any possible prejudicial

impact upon him is totally inconsistent with the procedure approved by this Court in *Smith* v. *Phillips*, 455 U.S. 209 (1982), and *Remmer* v. *United States*, 347 U.S. 227 (1954). In both cases, hearings—in which the jurors involved in a potentially prejudicial incident are thoroughly examined by the trial judge—were held to be the correct procedure. In *Remmer*, the Court directed such a hearing, ordering the trial judge to "determine the circumstances, *the impact thereof upon the juror*, and whether or not [they were] prejudicial in a hearing with all interested parties permitted to participate." 347 U.S. at 230 (emphasis added). In *Smith* v. *Phillips*, the Court approved the trial judge's examination of the juror at a hearing "like that ordered in *Remmer*." 455 U.S. at 217. As Justice O'Connor pointed out in her concurring opinion, 455 U.S. at 222:

> "A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case."

Such a modest requirement is mandated in a federal criminal trial, where defense counsel is not permitted to *voir dire* the potential jurors. In the *Smith* trial, by contrast, the *voir dire* consisted of "ten days of meticulous examination." 455 U.S. at 213, n. 4. In Petitioner's case the *voir dire* of the jury was conducted by the court in a few hours.

The constitutional right of an accused to be tried by an impartial jury lies at the very heart of the due process that marks the fair administration of criminal trials. *See Irvin* v. *Dowd*, 366 U.S. 717 (1961). When a defendant in a criminal proceeding is forced to keep a juror whose neutrality is in doubt, this cherished right is seriously threatened. In this case Petitioner reasonably feared that the jury foreman, because of his conversations with the FBI agent working with the prosecutor's office, may well be partial to the prosecution.

In these times when the fairness and equality of the criminal justice system is constantly being questioned, it behooves our

courts to take every step necessary to dispel such chronic and, in the eyes of many observers, justified mistrust. This case presents an opportune moment for this Court to strengthen the guidelines for investigating juror prejudice. It is imperative that the Court identify for the guidance of trial judges the constitutional standards to be employed in conducting such inquiries. A fair and objective assessment of guilt or innocence is one of the most cherished policies of our system of justice. Maintaining the integrity of the jury system in criminal cases is essential if this important principle is to remain meaningful.

The First Circuit's decision masks the real dangers inherent in the procedure employed by the trial judge to discover whether or not the foreman of petitioner's jury was tainted by his contact with an FBI agent working in the prosecutor's office. Today, more than ever, it is imperative that juror prejudice be adequately investigated by methods that comport with constitutional due process. The methods used by the court below fell far short of the standards set by this Court.

Conclusion

For all these reasons, the Petition for Certiorari should be granted.

July 21, 1983

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 82-1024

UNITED STATES, *Appellee*,

v.

NUNZIATO FUSARO, *Defendant, Appellant*.

No. 82-1025

UNITED STATES, *Appellee*,

v.

RICHARD R. SACCONE, *Defendant, Appellant*.

No. 82-1060

UNITED STATES, *Appellee*,

v.

RICHARD E. ROBIDOUX, *Defendant, Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Frank H. Freedman, *U.S. District Judge*]

Before COFFIN, *Chief Judge*, SWYGERT,* *Senior Circuit Judge* and BREYER, *Circuit Judge*.

Frederick S. Pillsbury, with whom *Doherty, Wallace, Pillsbury & Murphy* was on brief, for appellant Nunziato Fusaro.

Stephen W. Silverman, by appointment of the Court, for appellant Richard R. Saccone.

Harry C. Mezer, for appellant Richard E. Robidoux.

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* Of the Seventh Circuit, sitting by designation.

George F. Kelly, Special Assistant United States Attorney, with whom *William F. Weld*, United States Attorney, was on brief, for appellee.

May 26, 1983

SWYGERT, Senior Circuit Judge. These three consolidated appeals arise from the convictions of Nunziato Fusaro, a prominent Worcester attorney, Richard Saccone, president of Mohawk Trust and Savings Bank of Greenfield, Massachusetts ("Mohawk"), and Richard Robidoux, a businessman, on federal charges relating to a scheme that defrauded Mohawk, a small federally-insured bank. After a twenty-day trial including the testimony of more than fifty witnesses, these three men were convicted of misapplication of bank funds, 18 U.S.C. § 656 (1976), unauthorized issuance of checks, *id.* § 1005(1), false entries in bank books, *id.* § 1005(3), false statements on promissory notes, *id.* § 1014, and conspiracy to commit these offenses and to defraud the Federal Deposit Insurance Corporation ("FDIC"), *id.* § 371. We affirm.

The defendants raise numerous objections, and brevity will be served by joint treatment of their common objections. Following the presentation of the facts in Part I, we consider Fusaro's and Saccone's objections to the sufficiency of the evidence in Part II. Part III discusses Fusaro's and Saccone's objections to the jury instructions. In Parts IV and V, we treat, respectively, Fusaro's and Robidoux's remaining objections.

I

It is unnecessary to recount the voluminous evidence presented and we report here only the gist and some of the highlights of the case. In October 1979 Robidoux, a ten-year client of Fusaro, was in financial trouble. The principal lender to United Chevrolet ("United"), a General Motors dealership owned by Robidoux, denied further credit to United and demanded repayment of existing loans. United owed General Motors Ac-

ceptance Corporation approximately $825,000, and Robidoux owed Fusaro substantial sums for legal services. Robidoux had other debts, clamoring creditors, and other assets.

Saccone became president of Mohawk in August 1978. Shortly thereafter, an attorney employed by Fusaro became Mohawk's legal counsel. Mohawk is a small bank, capitalized at $300,000, and pursuant to Mass. Gen. L. ch. 172, § 54(a), subs. (b), Mohawk's lending limit to any one person was $60,000. Saccone was authorized to grant secured and unsecured loans of $10,000 prior to approval of Mohawk's Executive Committee.

The financial bleeding of Mohawk took place on several fronts. First, without prior approval of Mohawk's Executive Committee, Saccone authorized a $50,000 unsecured loan to Robidoux and a $50,000 secured loan to United. Mohawk had had no prior dealings with Robidoux or United, and no credit checks were performed. After the loans were authorized, Fusaro furnished the supporting credit information which omitted substantial liabilities of Robidoux. Of this initial $100,000, Fusaro kept half, crediting the funds to Robidoux's debts to Fusaro.

Second, in a two-week period Saccone authorized thirteen loans, without prior Executive Committee approval and without credit checks, to individuals who did not know they were becoming indebted to Mohawk. Some of these individuals had consented to help Robidoux obtain loans from Mohawk, but they had not consented to become debtors of Mohawk. The supporting financial information, some of which was materially false, was prepared in large part by Fusaro, although Robidoux, without authorization, signed the names of these borrowers to the documents. These loans, totalling some $620,000, went to Fusaro's or Robidoux's benefit. When the loans became due, the debt was extended, without prior approval by Mohawk's Executive Committee, by a virtually worthless third mortgage on some of Robidoux's assets, and with secured notes from friends of Robidoux who were told that Robidoux would be responsible for repayment. The evidence indicates Saccone was aware of these assurances.

Third, as a financial basis for Mohawk's increased lending activity, Fusaro and Robidoux arranged for the temporary open-

ing of fourteen accounts and $400,000 in fund transfers to Mohawk. The evidence indicates Saccone knew these were temporary fund transfers. One such account was opened in Fusaro's law office. Most of these funds were withdrawn a few weeks after they were deposited.

Fourth, as the house of cards began to fall, other desperate steps were taken. Fusaro arranged for the transfer of Robidoux's house to Fusaro's sister-in-law. Fusaro arranged to buy out Mohawk's $50,000 loan to Robidoux through a deal involving the assignment of the note to Fusaro's sister-in-law, using a check from Fusaro's nephew. Other actions were taken which need not be recounted. Mohawk's records are neither accurate nor complete. The entire episode lasted only a few months, from November 2, 1979, to February 15, 1980, when Mohawk was closed and the FDIC liquidator took over. Robidoux and United filed for bankruptcy a month later.

All three defendants testified. Robidoux claimed he signed the names because his lawyer, Fusaro, told him to do so. Saccone claimed that he was duped by Fusaro, who, in Saccone's view, was Mohawk's lawyer. Fusaro claimed he knew nothing about the fraud, and, when he found out, he took steps to insure that Robidoux paid back the money.

II

Fusaro's and Saccone's challenge to the sufficiency of the evidence focuses primarily on evidence concerning knowledge and intent. Viewing the evidence as a whole, with all reasonable inferences drawn in a light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Patterson*, 644 F.2d 890, 893 (1st Cir. 1981), we find no merit in either defendant's objection.[1]

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1 Fusaro argues that our review of the evidence should be limited to the government's case-in-chief and Fusaro's defense. Fusaro cites no precedent for this unusual rule, and we see no reason to adopt it.

Both defendants rely upon *United States v. Gens*, 493 F.2d 216, 221-23 (1st Cir. 1974). It is clear, however, from *Gens* that the *sine qua non* of charges of willful misapplication of bank funds is action taken with the knowledge of harm to, intent to harm, or reckless desregard for, the financial health of the bank. In *Gens* no such showing was made. Here, however, it is a fair inference that the loans at issue were made, at the very least, with a conscious disregard of a substantial and unjustifiable risk of injuring Mohawk. The crimes here, after all, concerned over $600,000 in loans for the benefit of one uninvestigated creditor by a very small bank.

Saccone's undisputed lies about the loans to various examiners, bank officials, bank employees, and debtors, as well as his failure to comply with Mohawk policies and state regulations create a more than substantial basis for the inference that he acted with the requisite knowledge and intent. It is no answer, as Saccone asserts, that he lacked motive because he was not financially enriched by the scheme. Motive is not synonymous with intent.

Fusaro's active participation in so many aspects of the scheme as well as his attempts to cover up the scheme as it unravelled, likewise, provides the basis for the inference that he acted with the requisite intent and knowledge. As to the fraudulent bank record entries, Fusaro's lack of knowledge of the specific entries is no defense. Once Fusaro's membership in the conspiracy is established, he is legally responsible for his co-conspirators' steps taken in furtherance of the objects of the scheme. *Pinkerton v. United States*, 328 U.S. 640 (1964).

Saccone asserts that the evidence was insufficient to prove him guilty of conspiracy because he met Robidoux only once, well after the initiation of the scheme, and did not know Fusaro well. The short answer to this claim is that a party to a conspiracy need not even know the identity of his co-conspirators. *United States v. Middlebrooks*, 618 F.2d 273, 278, modified on other grounds, 624 F.2d 36, 37 (5th Cir. 1980) (per curiam). The long answer is that it is undisputed that Saccone knew Fusaro and knew who Robidoux was and knew Robidoux was the true beneficiary of the loans Saccone authorized.

Saccone's assertion that the evidence was insufficient because the government failed to prove Mohawk was a federally-insured bank is, likewise, meritless. Saccone conceded the issue in his opening remarks, and two FDIC employees' and a State Banking Commissioner's testimony all indicated the bank was federally insured. Our review of the record indicates that Mohawk's status as a federally-insured bank could be easily inferred from this testimony. This case in unlike *United States v. Bliss*, 642 F.2d 390 (10th Cir. 1981), in which the trial judge set aside guilty verdicts on the ground that there was no evidence the bank was a member of the Federal Reserve, and the appellate court agreed that the bank's status was not inferentially established. *Id.* at 391.

III

We turn next to Saccone's and Fusaro's objections concerning jury instructions. The underlying facts are not clearly presented by the parties. The trial judge requested submission of proposed jury instructions prior to the commencement of trial on October 19, 1981. On November 12 the government submitted a lengthy memorandum in support of its proposed jury instructions. On November 16 Fusaro and Saccone submitted a brief set of jury instructions but they did not submit any memorandum discussing the merits of conflicting proposals. At the close of the evidence on November 24 the trial court and the parties discussed the proposed jury instructions, and the court indicated the general direction it would take. On the morning of final arguments, November 30, Saccone and Fusaro submitted second proposals, again without any discussion of the merits of conflicting proposals, and a request, pursuant to Fed. R. Crim. P. 30, to be informed of the court's jury instructions prior to argument. The court stated that it would not take the time to "go through . . . again" its previous discussion of jury instructions. At closing argument Fusaro stressed the importance of finding specific intent to harm or defraud the bank, and Saccone stressed the importance of his defense of reasonable reliance on his attorney's advice. After the court gave the charge to the jury, but

before it excused the jury, the court asked counsel if there were any objections. Neither counsel objected to the instructions argued here as objectionable.

Fusaro and Saccone claim that the district court violated Fed. R. Crim. P. 30 and, by omitting the instructions objected to here, severely prejudiced their defenses. In *Hamling v. United States*, 418 U.S. 87, 134-35 (1974), the Supreme Court indicated that a mechanical approach to rule 30 is inconsistent with the rule itself as well as with Fed. R. Crim. P. 52(a). We think the November 24 bench conference satisfied the requirements of rule 30. The rule's object, to fairly inform the trial lawyers so that they may intelligently argue to the jury, *United States v. Clay*, 495 F.2d 700, 707 (7th Cir.), *cert. denied*, 419 U.S. 937 (1974), was satisfied by the court's general indications. *Id.* at 708. *See also United States v. Newson*, 531 F.2d 979, 982-83 (10th Cir. 1976). While there can be no question that a full and explicit discussion of jury instructions is preferred, defense counsel, through their own lack of diligence, forced the trial court to handle the instructions during the press of trial and without the advantage of fully presented arguments. The court indicated that it would give a specific intent instruction concerning the 18 U.S.C. § 1005 counts and an instruction concerning Robidoux's defense of reliance on his lawyer's advice. The court did give such instructions, as discussed below, although not in the precise form requested. We agree with the Tenth Circuit in *Newson*, *supra*, that "the trial court is not bound to give instructions in the form and language requested, and that if the instructions as given are correct and cover the issues of the case, the judgment will not be disturbed." 531 F.2d at 983.

Fusaro and Saccone, moreover, did not even object at trial, when the alleged errors could easily have been corrected. They must establish, therefore, that the jury instructions were plainly erroneous. *United States v. St. Germain*, 680 F.2d 874, 877 (1st Cir. 1980). Taking the instructions as a whole, there was no plain error.

The format of the instructions was a very detailed and indisputably complete recitation of the law, particularly the defini-

tion of intent and knowledge, followed by a brief restatement of the remaining charges with explicit cross-reference by the trial court to the earlier, fuller definitions. By singling out only this latter portion of the charge, Fusaro ignores the cross-reference format and the rule that we review the jury instructions as a whole.

Saccone's complaint that the placement of the charge concerning his defense was faulty is based on the same distortion of the form of the jury instructions. The instruction did not refer to certain counts, but explicitly was directed to the issue of intent in all the counts in which intent was an issue. When viewed as a whole the court's presentation of the issue enabled the jury to understand its importance.

Fusaro claims plain error in the charge that "[y]ou may consider any evidence that Fusaro was unaware of the circumstances surrounding the loans" because the jury should have been instructed that it must consider such evidence. We do not find any basis for holding that this semantic distinction constitutes plain error. The jury was well aware that Fusaro's knowledge was crucial to its determination of his guilt or innocence.

Saccone complains that the instruction concerning his defense of reasonable reliance upon his lawyer's advice was too brief and alluded to too quickly. Saccone cannot and does not argue, however, that the instruction failed to communicate to the jury the substance of his defense. *See United States v. Coast of Maine Lobster, Inc.*, 557 F.2d 905, 909 (1st Cir.), *cert. denied*, 434 U.S. 862 (1977). We find no plain error in the instruction.

IV

We now consider Fusaro's remaining objections. First, Fusaro objects to the sufficiency of the indictment. Fusaro argues that because intent to injure or defraud the bank is an implied element of 18 U.S.C. §§ 1005(1), (2) (1976) ("section 1005"), and because the relevant counts of the indictment do not include intent, these counts fail to state a federal offense. He also argues

that Count 1, paragraph 3, charging conspiracy to violate 18 U.S.C. § 656, is insufficient because it does not include an intent charge.

This circuit has not decided whether specific intent is an implied element of section 1005, and the circuits are split on this issue. Compare *Harrison v. United States*, 279 F.2d 19, 23 (5th Cir.), *cert. denied*, 364 U.S. 864 (1960) (specific intent is not an element), with *United States v. Pollack*, 503 F.2d 87, 91 (9th Cir. 1974) (specific intent is an element).

Fusaro's objection to the indictment affords us no opportunity to decide the section 1005 intent issue. When the crime is defined by statute without reference to intent, the indictment need not allege it. *See United States v. Behrman*, 258 U.S. 280, 288 (1922); *Pino v. United States*, 370 F.2d 247, 249 (D.C. Cir.) (per curiam), *cert. denied*, 387 U.S. 922 (1967). The indictment is sufficient if the offense is described with sufficient clarity to show a violation of law, and enables the accused to know the nature and cause of the accusation against him and to plead an acquittal or conviction in bar of future prosecution for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974). The relevant counts track with specificity the statutory language and satisfy the *Hamling* test.

Fusaro, moreover, was not prejudiced by the failure to allege intent in the relevant counts. The trial court here instructed the jury that in order to find a violation of section 1005, it must find an intent to injure or defraud. Fusaro's objection to the indictment is subject to the harmless error provision of Fed. R. Crim. P. 52(a). *United States v. Morrison*, 531 F.2d 1089, 1094 (1st Cir.), *cert. denied*, 429 U.S. 837 (1976); *United States v. Van West*, 455 F.2d 958, 959 (1st Cir. 1973) (per curiam).

Fusaro's objection to Count 1, paragraph 3, is equally without merit. The essence of the objection is that this conspiracy count did not define with precision the underlying substantive violations, delineated with unobjectionable specificity in those counts charging Fusaro directly with the substantive offense. The law is clear that a conspiracy count need not describe the substantive crime with the same degree of particularity as the count

charging the substantive offense itself. *Rivera v. United States*, 57 F.2d 816, 819 (1st Cir. 1932). *See also Williamson v. United States*, 207 U.S. 425, 447 (1908). Because the conspiracy count tracked the language of the conspiracy statute, 18 U.S.C. § 371 (1976), it satisfied *Hamling*, *supra*, 418 U.S. at 117.

Fusaro next objects to the district court's disposition of his motion for judgment of acquittal at the close of the government's case-in-chief. At bottom, this objection concerns what evidence may properly be considered either by the trial court or the appellate court. Because Fusaro presented evidence in his defense, the law is clear in this circuit that he has waived his objections concerning this motion. *See United States v. Kilcullen*, 546 F.2d 435, 441 (1st Cir. 1976), *cert. denied*, 430 U.S. 906 (1977); *Colella v. United States*, 360 F.2d 792, 802 (1st Cir.), *cert. denied*, 385 U.S. 829 (1966); *Guant v. United States*, 184 F.2d 284, 290 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951). See generally 8A J. Moore, Federal Practice § 29.05 (rev. ed. 1981).

Fusaro urges us to create an exception to this rule because his evidence was introduced solely in response to the codefendant's testimony. This exception finds support in *Cephus v. United States*, 324 F.2d 893 (D.C. Cir. 1963). Three critical facts distinguish *Cephus*: the government's case-in-chief was insufficient, 324 F.2d at 895; the defendant was severely prejudiced by application of the waiver rule, *id.* at 897, and the record was clear that the defense evidence was offered only because the codefendant testified, *id.* at 897 n.19. Given these facts, the *Cephus* court felt compelled to create an exception to the waiver rule, *id.* at 897. Fusaro makes no attempt to establish the insufficiency of the government's case-in-chief. He is silent as to how application of the waiver doctrine prejudices him. Finally, nothing in the record indicates that Fusaro's evidence would not been introduced if his codefendants had not testified. As such, even if we accepted *Cephus*, this appeal would not merit the creation of an exception to our long-standing and simple rule of waiver.

On the second day of trial an FBI agent held an animated five-minute conversation with the foreman of the jury. Called to

the court's attention, the FBI agent testified that he had met the foreman at a local woodworking class, that at the time of the conversation the agent did not know the foreman was a juror, that the conversation in no way included any aspect of the trial, that the FBI agent had nothing to do with the case, and that, having learned the juror's status, the FBI agent had avoided any further contact with him. The court asked many questions of the agent designed to discover any prejudice. Fusaro's counsel indicated that he was satisfied that no prejudice had occurred, but he would check with his client. Shortly thereafter Fusaro's counsel moved to excuse the foreman. No counsel sought a voir dire of the foreman. The court denied the motion. This denial, according to Fusaro, requires us to reverse the judgment.

Fusaro's objections are similar to those raised and rejected in *United States v. Almonte*, 594 F.2d 261 (1st Cir. 1979). The foreman in *Almonte* was aware of an encounter and prior relationship between an excused juror and a witness. Here the foreman had a seemingly harmless encounter with someone completely uninvolved in the case. Until Fusaro chose belatedly to object, everyone agreed that this minor incident did not require dismissal of the foreman. As in *Almonte*, we find that the trial court did not abuse its discretion. *Id.* at 266.

Finally, Fusaro urges us to reverse his convictions because the trial court allegedly abused its discretion when it refused Fusaro's presentation of a rebuttal witness who would have corroborated Fusaro's testimony. The rebuttal witness was offered to corroborate Fusaro's credibility, particularly with respect to his knowledge of Robidoux's financial condition. However, this issue was in contention—by virtue of the government's case-in-chief—and critical to Fusaro's defense. As such, Fusaro has not demonstrated why the testimony was not offered during his first opportunity to present evidence. The trial court did not abuse its discretion. *See United States v. Winkle*, 587 F.2d 705, 712 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979). *See also Geders v. United States*, 425 U.S. 80, 86-87 (1976).

V

We now consider Robidoux's assignments of errors. Robidoux asserts that the district court committed reversible error when it failed to sever Robidoux's trial from Fusaro's because their defenses were antagonistic. Robidoux's defense was that he lacked the requisite intent because he reasonably relied upon the advice of his lawyer, Fusaro. Fusaro's defense was that he lacked the requisite intent and knowledge because Robidoux, his client, concealed the fraud.

Robidoux failed to raise properly the severance issue below. Robidoux joined Fusaro's pretrial severance motion, but the basis for the motion is completely dissimilar to the objection raised here. The motion was denied, and neither defendant advanced the severance issue during the trial. Nevertheless, Robidoux argues that the trial judge had a *sua sponte* duty to order severance during the trial. We need not reach the question of this duty or whether Robidoux has preserved the issue, because even if the issue had been properly presented to the trial court, Robidoux would not be entitled to reversal of his conviction for failure to sever.

A decision not to sever will be reversed only upon a showing of an abuse of discretion. *United States v. Talvera*, 668 F.2d 13, 21 (1st Cir. 1982). As Robidoux correctly observes, it is easier to state generally than to apply particularly the maxim that some line exists beyond which codefendants' defenses are so antagonistic that a fair joint trial is impossible. *Talvera*, *supra*; *United States v. Berkowitz*, 662 F.2d 1127, 1132-35 (5th Cir. 1981), and *United States v. Moschiano*, 695 F.2d 236, 245-47 (7th Cir. 1982), all repeat the rule that codefenses must be truly irreconcilable, and Robidoux stresses the irreconcilability of the defenses at his trial. But the inescapable conclusion of these cases, all of which found no error in the failure to sever, is that tattling or "finger-pointing" is not enough. If the defendants agree on the basic facts, the who, what, when, and where, so to speak, the failure to sever is not an abuse of discretion. Robidoux fails to

show why his defense is any more irreconcilable than the defenses in *Talvera*, *Berkowitz*, or *Moschiano*.[2]

The conclusion that tattling is not enough is borne out by the one appellate case Fusaro cites in which a conviction was overturned for failure to sever. In *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), Johnson's defense was that he was not present at the crime; he could not and did not testify whether his codefendant was involved in a crime. Johnson's defense concerned identity and certainly cannot be characterized as tattling.

To be sure, other principles, such as the burden upon the prosecution of multiple trials, *see Berkowitz*, *supra*, or whether the codefendant was the government's best witness, *see Berkowitz*, *supra*; *Johnson*, *supra*, weigh in the balance of the severance decision. But these considerations hardly weigh in Robidoux's favor. The burden upon the prosecution of two or three twenty-day trials was obviously great. The government, moreover, was aligned with Robidoux in impeaching Fusaro's defense on precisely the same issue claimed as antagonistic here. As such, Fusaro was not the government's best witness against Robidoux. Indeed, Robidoux's argument stands in sharp contrast to Johnson, where the only evidence placing Johnson at the crime was the testimony of Johnson's codefendant.

Robidoux next asserts that the indictment should be dismissed because the grand jury relied upon Fusaro's testimony which allegedly violated the attorney-client privilege.[3]

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2 Robidoux's reliance upon various district court opinions does not save his claim. *See United States v. Abrahams*, 466 F. Supp. 552 (D. Mass. 1978); *United States v. Valdes*, 262 F. Supp. 474, 476 (D.P.R. 1967). The issue here is appellate review for abuse of discretion, and these cases, distinguishable upon other grounds as well, are irrelevant to that inquiry.

3 What relief is available when an attorney and client are both the subject of a grand jury investigation and the attorney voluntarily violates the attorney-client privilege in his grand jury testimony is an unprecedented question. In dicta we have indicated that an attorney can be expected to assert the privilege, *In re Overkoetter*, 612 F.2d 15, 18 (1st Cir. 1980), and that a grand jury cannot violate a constitutional privilege, *United States v. Flaherty*, 668 F.2d 566, 585 (1st Cir. 1981). An indictment based upon evidence obtained in violation of the speech and debate clause (a privilege created by the Constitu-

Robidoux did not raise this objection below, and therefore the district court's failure to dismiss the indictment is reviewable only for plain error. *United States v. St. Germain, supra;* Fed. R. Crim. P. 12(b), (f).

It was not plainly erroneous to fail to dismiss the indictment or to order an inquiry into Fusaro's grand jury testimony. Robidoux's contends that it became obvious that a violation of the attorney-client privilege occurred when Fusaro testified at trial because Fusaro was not impeached by his grand jury testimony. This is a logical jump which we find unsupported. It is more likely that Fusaro invoked either the attorney-client privilege or his own fifth amendment right before the grand jury. In either case, the government would not, as a strategic matter, have attempted to impeach him at trial by use of his grand jury testimony: the prior invocation of either privilege would not have tarnished Fusaro's in-court testimony. It was not obvious, therefore, either from the face of the indictment or Fusaro's testimony that Fusaro violated the privilege, and, as such, no reversible error occurred.

As his final objection, Robidoux asserts that he was denied effective assistance of counsel. Robidoux points to trial counsel's failure to advance the severance motion and attorney-client privilege violation discussed above, as well as the failure to object to certain aspects of Fusaro's testimony, the failure to file individual trial motions and supporting arguments, the failure to raise a *United States v. Perrotta*, 553 F.2d 247, 250 (1st Cir.

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tion itself) may be dismissed. *United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980). But these cases, contrary to Robidoux's assertion, do not establish that dismissal of an indictment in the instant circumstances is the only proper relief. As a compromise, Robidoux asserts that he is entitled to a post-indictment hearing retrospectively assessing the propriety of the privilege's assertion. That is, if the government did not have *prima facie* evidence of fraud absent Fusaro's grand jury testimony, the privilege was valid and the indictment should be dismissed. The government, not surprisingly, argues that an indictment based in part upon evidence which violates the attorney-client privilege is valid. Because the question was not properly raised below and the record does not plainly indicate a violation, we need not and do not address this novel issue.

1977), objection, and the failure to object to certain jury instructions.

As stated in *United States v. Campa*, 679 F.2d 1006, 1014 (1st Cir. 1982):

> This circuit has adopted the "reasonably competent assistance" standard in reviewing such claims. This means that the quality of a defense counsel's representation should be within the range of competence of attorneys in criminal cases. *United States v. Thomann*, 609 F.2d 560, 566 (1st Cir. 1974); *United States v. Maguire*, 600 F.2d 330, 332 (1st Cir. 1979); *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978). Under this standard, "effective representation is not the same as errorless representation." *United States v. Bosch*, 584 F.2d at 1121, citing *Marzullo v. Maryland*, 561 F.2d 540, 543, 545 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978). Application of this standard does not mean that a court should "second guess reasoned choices between trial tactics," nor that defense counsel in order to protect himself against allegations of inadequacy must "waste the court's time with futile or frivolous motions." *United States v. Bosch*, 584 F.2d at 1121, citing *Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir. 1977), *appeal after remand*, 586 F.2d 1325 (1978), *cert. denied*, 440 U.S. 974 (1979); and *United States v. Wright*, 573 F.2d 681, 683-84 (1st Cir.), *cert. denied*, 436 U.S. 949 (1978); *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970).

Viewing these errors separately or in aggregate, we are convinced that Robidoux received effective assistance. The severance motion was probably futile. The attorney-client privilege violation was at best a novel claim and failure to spot it does not render counsel's assistance below the range of competence of attorneys. Robidoux fails to demonstrate how counsel's failure to file individual trial motions, make supporting arguments, or attend a pre-trial hearing would have altered any aspect of the

trial. The alleged jury instruction errors are not substantially different from those unsuccessfully raised here by Fusaro and Saccone, and, likewise, do not rise to a showing of ineffectiveness. The failure to object to Fusaro's opinion testimony concerning Robidoux's state of mind appears to have been an explicit trial strategy of Robidoux to demonstrate that Fusaro was an evil and vindictive man and the true culprit in the scheme. This strategy was obvious both in the opening and closing arguments as well as in Robidoux's own testimony. We refuse to second-guess such decisions. The alleged *Perrotta* error stands alone as an indication of possible ineffective assistance of counsel. Such a flimsy showing of ineffectiveness does not satisfy *Campa*.

We have considered all of the defendants' remaining objections and find them to be without merit.

The judgments of the district court are affirmed.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 82-1024

UNITED STATES, *Appellee*,

v.

NUNZIATO FUSARO, *Defendant, Appellant*.

JUDGMENT

Entered May 26, 1983

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
Francis P. Seigilano
Clerk.

[cc: Messrs. Pilsbury & Kelly.